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Judicial review in USA: With special reference to protection of wetlands

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Abstract
Judiciary has the power to review the other branches of Government viz. the executive, legislative as well as lower judiciary and this is called judicial review. In USA, the superior Judiciary enjoys the power of judicial review and upon various grounds a citizen's environmental litigation becomes basis for 'judicial review' with the stretched helping hands of the U.S. Judicial system. In this way, the Judiciary can review any law or action which violates any legal or fundamental rights. In U.S.A., the process of judicial review has become a process to rescue wetlands in USA as well as maintaining balance between wetlands conservation and ensuring sustainable development using wise use principles as set out by the International Convention. Enumeration of certain un-enumerated environmental rights within the purview of Personal liberty and adoption of principles of ultra vires in administrative actions has given boost to the wetlands protection and restoration mechanisms in USA. Inspite of some limitations, the US Courts have become successful in expanding the protection measures for wetlands by invoking concept of judicial review in compliance to international obligations of USA.

Keywords: judicial review, wetlands, ultra vires, environmental rights, clean water act

1. Introduction

The power of courts of law to review the actions of the executive, legislative branches as well as judiciary is called judicial review. The Supreme and State High Courts in USA enjoy the powers of judicial review and this is accepted as one of the basic features of US Constitution now a days. In USA, there are grounds like fairness, illegality, Unconstitutionality, procedural and substantive due process, violation or exceeding jurisdiction etc. for Judicial review. The primary Legal meaning of the term 'Review' as per dictionary [1] is 'a reconsideration of a judgment or sentence by a higher Court or authority'. Some countries' Constitutions are regarded as a paramount law but the concept of judicial review entails review of any law or action in violation of any rights entrusted by constitution or any other law.

Protection of wetlands is indispensible for the best enjoyment of human beings and other living organisms since wetlands is one of the important gifts of nature which functions as "Kidneys of landscapes" [2]. Protection of wetlands has got an unprecedented level of attention in the International arena and the efforts to define wetlands have instigated various theoretical and practical challenges in International field. It is also admitted that the ecological balance of wetlands is disturbed by human activity and humans are the ultimate victims of such degradation. For this rationale, a comprehensive approach is required to be formulated by the States going one step ahead from the law and the said can be done by the Courts of Law only. In USA, judicial pronouncements have given various interpretations regarding confusion on conflict of Section 404 Clean Water Act Programme and they have also helped in developing a compact scheme of action for better protection of wetlands in the U.S. by expansion of the jurisdiction of the various agencies [3] entrusted with the roles and responsibilities of wetlands protection in U.S.A. In this connection the private rights enshrined by the constitution is also dealt with by the US Courts and Courts have been excellent in balancing the two with some amount of limitations.

2. Concept and grounds of judicial review in usa

The written Constitution of USA is supreme over ordinary federal or State law [4]. Though there is no direct provision of judicial review in the Constitution, power of Supreme Court extends to all laws in conformity with the constitution [5]. Treason Clause [6] says that the courts must enforce against contrary federal legislation. In USA various kinds of Judicial review is observed like judicial review of Federal action, executive action, State action or agency action etc [7].

In Marbury vs. Madison [8], judicial review was first exercised on the ground of 'unconstitutionality' in USA [9] relying upon

1 Oxford Dictionary, Version 3.0.6, CB 51, Oxford University Press, 2007. Website: http//www.epocware.com

2 W.J. MITSCH & J.G. GOSSELINK, WETLANDS, 3 (4th ed., John Wiley & Sons, 2007).

3 *YEBOAH V. INS*, 2001 U.S. Dist. LEXIS 17360 (E.D. Pa. Oct. 26, 2001).

4 USA Constitution, Article-VI, Supremacy Clause.

5 Ibid, Article III Section 2.

6 Ibid, Article III section 3.

7 Anonymous, *Judicial Review Of Administrative Decisions*, https://administrativelaw.uslegal.com/judicial-review-of-administrative-decisions/ (last visited Oct. 12, 2017).

8 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803).

9 The facts of the case were thus: The elections of 1800 in the U.S.A. resulted in change of the President. In February 1801, Marbury was appointed as Justice of Peace for a period of five years by the outgoing President, John Adams as midnight appointees. The Senate confirmed the appointments and the warrants of appointment were signed and sealed. In March 1801, Thomas Jefferson took charge as the President of the U.S.A.

supremacy clause [10], where the court asserts its power to overrule political authority [11]. The Federal Judiciary is supreme in interpretation of the Constitution and that cannot be shared by the Executive Branch [12].

Justice Holmes's believed that the Union would be jeopardized if federal courts could not nullify state law [13]. The Federal Court can review the Constitutionality of State Statute [14] and the action of State Officials on ground of unconstitutionality [15]. But now, both the federal and state courts can set aside the state law if it is in conflict with the Constitution [16]. So, federal statutes inconsistent with the Constitution (those otherwise unconstitutional) are not statutes "made in Pursuance" of it, and such federal statutes are not part of the supreme Law of the Land [17].

But it was seen that scope of judicial review was narrow to protect individuals' fundamental rights previously. Thus later on due process clause which requires fairness, impartiality of judges [18] etc. in proceedings or actions evolved as grounds of judicial review in USA. The court held that the incorporated Bill of rights guarantee applies to federal as well as state Governments [19].

Procedural as well as substantive due process has broadened the scope of personal liberty and now various non-enumerated rights have been recognized under Bill of Rights like, Right to water [20], Right against green house gas emission [21], right to protect wetlands [22], mitigations of wetlands pollution [23], etc on various grounds. Thus fundamental right principle has provided for a stricter review of Governmental, legislative and executive actions in USA [24]. The concept of environmental lawsuits in the form of judicial review though is new concept in connection with the history of judicial review in USA.

In United States v. Lopez [25], the Supreme Court held that laws or actions exceeding the Constitutional authority of Congress can be effectively declared as ultra vires which has got a very important role while developing the role of judicial review in USA.

3. Development of a Wetlands Friendly Approach in Usa: A Legal Perspective

The constitution of USA is basically a pre-ecological era constitution which means that there was no mention of any environmental right either expressly or impliedly [26]. For this, the legislations enacted various laws relating to protection of environment as well as water and wetlands protection in USA. Previously, the US Swamp Land Acts of 1850 and 1855 were the initial sets of laws granting states the ability to reclaim swamplands, prevent destruction from flooding, and eliminate mosquito breeding areas [27] and that revamped securing present position when general public started to participate in wetlands protection and preservation in USA. These actions continued until the enactment of Federal Water Pollution Control Act, better known as Section 404 of the Clean Water Act, in 1972 and its supplemental made by Executive Order 1990 during the Carter Administration in 1977 [28]. After the value of wetlands was clarified by such Act, a "legally binding and scientifically defensible" [29] definition was needed to unite the cause of hydrologists, soil scientists, botanists, and other who were responsible for the protection and conservation of wetland habitats. This has arguably been the most difficult and critical component of conservation as the "battle over wetland protection and regulation has escalated" [30] to its current state. After multiple attempts, the most comprehensive and widely accepted definition and classification for wetlands in the United States was developed by the United States Fish and Wildlife Service in 1979 [31], and is more commonly known as the "Cowardin System" [32]. This

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At his instance, the Secretary of State, James Madison, declined to deliver the warrant of appointments to Marbury who sought a writ of mandamus against the Secretary from the Supreme Court for delivery of warrants attempting to intrude and intermeddle with the prerogatives of the executive. Chief Justice Marshall, nevertheless, held that the Act establishing the judicial courts of the United States conferring authority on the Supreme Court to issue writ of mandamus, inter alia, to public officers in its original jurisdiction which was not warranted under the Constitution, was void and Chief Justice Marshall held §13 of the Judiciary Act of 1789 as unconstitutional.

10 USA Constitution, Article VI clause 2.

11 TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (1st ed. USA, 2003).

12 *UNITED STATES V. NIXON*; 418 U.S. 683 (1974).

13 *See* OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 295–96 (1st ed. Harcourt 1920).

14 *MARTIN V. HUNTERS' LESSEE*, 14 U.S. 304 (1816); the Supreme Court held that Section 25 of Judicial Act 1789, conferring Appellate jurisdiction on the Supreme Court over the decision of a State Court is Constitutional.

15 CHARLES A. SHANOR, AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RECONSTRUCTION: CASES, NOTES AND PROBLEMS, 31 (3rd ed. Minn, 2006).

16 *TEXAS V JOHNSON*, 491 US 397, 399 (1989) (invalidating a Texas law that prohibited desecration of the American flag).

17 Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*; 69 University of Chicago Law Review, 20 (Summer 2003), available at http://ssrn.com/abstract=426860.

18 SHEPHERD VS. FLORIDA, (1951) 331 US 50

19 DUNCAN V. LOUISIANA, 391 U.S. 145 (1968), *see also* JEROME A. BARRON & C. THOMAS DIENES; CONSTITUTIONAL LAW IN A NUTSHELL, 145 (2nd ed. St. Paul, Minn, 1991).

20 *COLORADO RIVER WATER CONSERVATION DISTRICT V. UNITED STATES*, 424 U.S. 800 (1976).

21 *AMERICAN ELEC. POWER CO., ET AL. V. CONNECTICUT, et al.*, 564 U.S. 410 (2011).

22 *SACKETT V. ENVIRONMENTAL PROTECTION AGENCY*, 132 S.C.T. 1367(2012).

23 *KOONTZ V. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT*, 133 S.C.T. 2586 (2013); *PALAZZOLO V. RHODE ISLAND*, 533 U.S. 606 (2001); *SOUTH FLORIDA WATER MANAGEMENT DISTRICT V. MICCOSUKEE TRIBE*, 541 U.S. 95.

24 BARRON, *see supra* note 18, at 186.

25 514 U.S. 549(1995).

26 Kyle Burns, *Constitutions & the Environment: Comparative Approaches to Environmental Protection and the Struggle to Translate Rights into Enforcement*, GEORGETOWN ENVIRONMENTAL LAW REVIEW (Nov 12, 2016), https://gelr.org/2016/11/12/constitutions-the-environment/ (Last visited Oct. 12, 2017).

27 S. P. SHAW & C. G. FREDINE, WETLANDS OF UNITED STATES, THEIR EXTENT, AND THEIR VALUE FOR WATERFOWL AND OTHER WILDLIFE CIRCULAR NO. 39 (1st Ed. U.S. Fish and Wildlife Service, 1956).

28 Protection of Wetlands, EXECUTIVE ORDER No. 11990 (May 24, L977, 42 F.R. 26961).

29 Cheryl L. Jamieson, *An Analysis of Municipal Wetlands Laws and Their Relationship to the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar)*, 4 PACE ENVIRONMENTAL LAW REVIEW 177, 187 (1986-1987).

30 *Id.*, at 183.

31 L.M. COWARDIN, ET. AL., CLASSIFICATION OF WETLANDS AND DEEPWATER HABITATS OF THE UNITED STATES, 3 (1st ed. Reprint, US Fish and wildlife Service, 1992).

32 *Id.*

system defines wetlands as,

"[L]ands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purpose of this classification, wetlands must have one or more of the following three attributes [33]:

(1) at least periodically, the land supports predominantly hydrophytes [(plants that grow in water)]

(2) the substrate is predominantly undrained hydric soil [(wet and periodically anaerobic)] and (3) the substrate is nonsoil and is saturated with water or covered by shallow water at some time during the growing season of the year".

This definition holds an important role, serving as the basis for the first National Wetland Inventory of 1979 [34]. Thereafter, the 1972 Federal Water Pollution Control Act, better known as Section 404 of the Clean Water Act, was enacted to protect waters and wetlands in the USA. Section 404 of the Clean Water Act "*established a program to regulate the discharge of dredged and filled material into the waters of the United States and requires a permit before dredged or fill material may be discharged into waters of the United States*" [35]. Enforcement of Section 404 are based upon multiple federal resource agencies for enacting and enforcing Section 404 Clean Water Act [36]. The United States Environmental Protection Agency is charged with legislative and regulatory matters in relation to Section 404, as well as delegation of authority over permitting and oversight of wetlands [37]. This includes delegation to state and tribal authorities. They also maintain the power to veto decisions of the United States Army Corps of Engineers [38]. Under the Clean Water Act, the Army Corps of Engineers is charged with the responsibilities of wetland delineation and permitting, and use the 1987 Army Corps of Engineers Wetland Delineation Manual [39] as their foundation. Finally, the United States Fish and Wildlife Service, in accordance with the Fish and Wildlife Coordination Act, is charged with evaluating impacts on fish and wildlife for all federal projects, including those which fall under the jurisdiction of Section 404 [40]. But sometimes the jurisdictions of these three overlaps and then the Courts have to come with their decisions to resolve the problem [41]. The principles of wise use [42], mitigation banking [43], No-net loss approach [44] everything was added for better implementation, but the problem still existed because it is not possible to balance equally development in one hand and protection of wetlands on the other hand. And thereafter the problem thus starts with the enforcement goal in USA.

Enforcement of the wetlands or environmental law is a problem in each Nation [45] and Judicial Review in USA has tried to fill up the said flaw in enforcement of wetlands law in USA. It is true that 'translating new environmental law' [46] is not possible by judicial review rather it gives a better way in which the laws can be enforced properly. During the process of judicial review, the opinion of the judges becomes 'stare decisis' or even the 'obiter dictum' which helps in explaining the existing law. Some of the US Courts also take reference from the UK Courts' decisions and by which the US Courts have been able to frame their own common law like the courts' of the UK [47] which has been discussed in the next section.

4. Judicial Review and Protection of Wetlands in Usa

In the constitution of USA, no environmental rights have been enshrined but the right to environment is part and parcel of right to life as a whole and the Courts hands are not tied in stretching the periphery of the right to life towards right to environmental health. But this power of judicial review flows from the 'Commerce Clause' [48] of Constitution as of the environment protection law in the U.S. It is seen that the Courts in USA are applying the writ of '*ad quod damnum*' to further enunciate the concept of wetland's wise use and sustainable development [49]. This is so powerful writ so that it may allow the party to even withdraw the development if no wise use concept is fruitful [50]. Third party is also bind by the said judgment arising out of the said writ [51]. It is also important that by using *resjudicata* principle [52], the US Courts have invented their own common law [53] for making their future more secure in case of development to the wetlands and making the concept of Ramsar's wise use concept stronger.

In UNITED STATES V. HOLLAND [54], the rules relating to jurisdiction towards 'test of traditional navigability' over inter-tidal wetlands and manmade canals by Army Corps and Environment Protection Agency came up as an issue before the Court and it was decided that those are within the jurisdiction of the Army Corps and the court will not limit the working of Clean Water Act. In 1975, in NATURAL resources defense council v. Callaway [55], the definition of "water of the United States" cropped up as a quarrelsome issue and the Army Corps of Engineer's regulations was questioned by Environment Protection Agency, since Army

33 Id., at 4-21.
34 *Id.*
35 Section 404 Permit Programme, https://www.epa.gov/cwa-404/section-404-permit-program (last visited Oct 12, 2017).
36 MEMORANDUM between The Department of the Army and The Environmental Protection Agency, Federal Enforcement for the Section 404 Program of the Clean Water Act (January 1989), https://www.epa.gov/cwa-404/federal-enforcement-section-404-program-clean-water-act (last visited Oct. 7, 2017).
37 *Id.*
38 *Id.*
39 ENVIRONMENT LABORATORY, WETLANDS DELINEATION MANUAL (1st ed., US Army Corps of Engineers, 1987).
40 US EPA, 2009.
41 *RAPANOS V. UNITED STATES*, 547 U.S. 715 (2006).
42 Fred P. Bosselman, *Limitations Inherent in the Title toWetlands at Common Law*, 15 STANFORD ENVIRONMENTAL LAW JOURNAL 247, 336 (1996).
43 Bruce J. Marshall, *The World's Wetlands, is their Future Secure?*, 6 NEW ENGLAND INTERNATIONAL & COMPARATIVE LAW ANNUAL. 9, 15 (2000).
44 *Id.*, at 14.
45 Burns, *supra* note 26.
46 *Id.*
47 Bosselman, *supra* note 42, at 336.
48 Article I, S.8.
49 Bosselman, *supra* note 42, at 336.
50 *Id.*
51 *Id.*, at 336-337.
52 *Id.*, at 336-337.
53 *Id.*, at 337.
54 373 F. Supp. 665 (M.D. Fla. 1974).
55 392 F. Supp. 685 (D.D.C. 1975).

Corps tried to include areas such as wetlands adjacent to traditional navigable waters and their tributaries, as well as all other isolated wetlands which have no hydrological connection to other water bodies but had some nexus to interstate commerce. The court held that Congress intended the CWA jurisdiction to extend to the maximum extent possible to protect wetlands. Both of the cases helped in better implementation of the Clean Water Act.

In colorado river water conservation district v. United states [56], the Supreme Court of USA invented the '*doctrine of abstention*' [57] to avoid duplicate litigations or multiplicity of proceeding between State and Federal Courts which was nothing but reproduction of 'Doctrine of Amity and comity'[58] so that the Courts can themselves refrain from passing any judgments over self same issue or cause of action.

In riverside bayview homes v. United states [59], the Supreme Court expanded the jurisdiction of the Army Corps deciding that 'limited jurisdiction' is not applicable to the administrative directions issued by the Army Corps in compliance with the Clean Water Act where a development project was causing serious disturbance upon adjacent wetlands which was within the jurisdiction of Army Corps. However in solid waste agency of northern cook county v. u.s. army corps of engineers [60], the supreme Court curtailed the extended application of 'Migratory Bird's Rule' [61] while deciding the issue relating to permission from Army Corps' of Engineer in filling of wetlands to inland waters and stated that the extended application of Migratory birds rule is not allowed [62].

In the case of RAPANOS V. UNITED STATES [63], the issue relating to jurisdiction of the "waters of the United States" especially with regard to the isolated wetlands, i.e. wetlands not near or adjacent to a navigable body of water, as referred to earlier Section 404 of the Clean Water Act came up before the Court. Supreme Court stated that there was no "Significant nexus" between the wetland to a navigable body of water and it was only a navigable waterway and thus the previous Courts decisions were overruled and overstepping of delegated powers the United States Environmental Protection Agency and United States Army Corps of Engineers was barred [64].

Regarding illegal filling of wetlands or tidelands, ZABEL V. TABB [65] is one of the important cases since Court are in favor of stringent conditions for permit process. It also dealt with the procedures relating to general permit grant process and the ecological factors and environment conditions which are to be taken into consideration by the Army Corps while granting permits in general or specific cases.

In south florida water management district vs. Miccosukee tribe of Indians [66], which came before the Supreme Court regarding the issue of protection indigenous community and wetlands filling with polluted water and dredged material, the court upheld protection of the community and wetlands and its ecology in compliance to the enactments of US. In 2005, punitive and pecuniary damages were imposed by the Court in UNITED STATES V. LUCAS [67] which dealt with development and sale of fragmented lands without permission from the Army corps. Lucas also developed the land by filling up the wetlands and thereafter constructed roads and ways. The Decision was affirmed on appeal by the U.S. Court of Appeal for the Fifth Circuit and later denied certiorari by the U.S. Supreme Court. It enunciated that EPA or Army Corps cannot impose fine whereas Courts can impose both punitive and pecuniary damages.

In the NEW HAMPSHIRE DEVELOPMENT CASE [68], the state of New Hampshire designed a proposed highway to give relief from traffic and the EPA invoked CWA section 404(c) "veto" action to stop the project noting various issues that the New Hampshire State failed to produce the consequences and mitigation to the minimum effect on wetlands. However EPA rejected it showing the probable adverse impacts after design changes and then the authority went to court against the action of EPA but Courts ruled in favor of EPA Action. Thus the scope of review has expanded in this case to all of southern New Hampshire.

In SACKETT V. UNITED STATES ENVIRONMENT PROTECTION AGENCY [69], the Supreme Court held that Clean Water Act does not prevent Courts to entertain Judicial review against the Order under S.309(a) Compliance Order issued by the EPA and thus the Courts hands have become more strong in wetlands related cases. In KOONTZ V. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT [70], the action of administrative authority was challenged in the Court while development plan was rejected and thereafter the Court upheld the concept of sustainable development.

Not only this, the US Courts has followed the decisions of UK Courts and has developed similar approach towards protection of wetlands [71]. The decision of the Court relies upon the fact that the ownership of land is not a constitutional right and absolute right and as such development without permission is not allowed in US [72]. However the Supreme Court in nollan V. California coastal commission [73] and dolan V. City of Tigard [74] stated the conditions under which the property rights would be vested and constitutional one. Even in

56 424 U.S. 800 (1976).

57 Gaspard Curioni, *Note: Interest Balancing And International Abstention*, 93 BOSTON UNIVERSITY LAW REVIEW 621, 626-634 (2013).

58 Sunil Ambwani, *'Stare decisis', amongst High Courts*, 4, available at http://hcraj.nic.in/Paper-Speech/09-Doctrine_of_State_Decisis_and_the_High_Courts.pdf.

59 474 U.S. 121.

60 (99-1178) 531 U.S. 159 (2001).

61 51 Fed. Reg. 41, 206, 41, 217 (1986).

62 T. S. Bishop et. al., *One For The Birds: The Corps Of Engineers' "Migratory Bird Rule"*, https://www.mayerbrown.com/files/Publication/febec527-f5eb-4dfd-852e-1d23ea30da63/Presentation/PublicationAttachment/1a8720a1-8405-4c2f-b4cd-74d226c899e2/migrabirdrule.pdf (last visited Oct. 7, 2017).

63 547 U.S. 715 (2006).

64 Alexandre S. Timoshenko, *Protection of Wetlands by International Law*, 5 PACE ENVIRONMENTAL LAW REVIEW 463 (1987-1988).

65 430 F. 2d 199, 201 (5th Cir. 1970).

66 541 US 95 (2004).

67 *UNITED STATES V. ROBERT J. LUCAS*, 516 F. 3d 316 (2008).

68 *CONSERVATION LAW FOUNDATION v. NEW HAMPSHIRE WETLANDS COUNCIL* (2003).

69 132 S.C.T. 1367 (2012).

70 133 S.C.T. 420 (2013).

71 Bosselman, *supra* note 42, at 330.

72 *SYLVIA DEVELOPMENT CORP. V. CALVERY COUNTY*, 48 F.3d 810 (4th Cir, 1995).

73 438 U.S. 825.

74 512 U.S. 374.

wetlands cases, the US Courts are not refrained from applying the 'concept of customs' from common law principle to limit land use and apply wise use as enunciated in Stevens V. City of cannon beach [75]. Even the rule of standing was relaxed too some extent in US Courts. Thus in this manner the cultural heritage of wetlands protection was developed by the US Supreme Court.

5. Conclusion

Inspite of strong principles of 'judicial review', it has got some limitations. In USA, the Court cannot determine the constitutionality of a statute unless it is properly raised in a 'case' or 'controversy' before it [76]. The primary limitation is that the Court cannot adjudicate a dispute unless and until it is brought by some individual or individuals regarding the violation of their rights in the prescribed manner [77]. For this reason, these environmental litigations are increasing day by day in U.S.A. which is a good sign of increasing awareness of people in environmental matters. The Court formulated another limitation that the Court will not exercise the Judicial Review for the purpose determining either the abstract, contingent or hypothetical issues [78]. If the question involves a substantial question as to challenge the constitutionality of a statute or it is absolutely necessary or unavoidable for the ascertainment of the rights of the parties, the Court will not enter upon the question of constitutionality [79]. The growth of judicial review in all the countries is the inevitable response of the judiciary to ensure proper check on the exercise of public power. Growing awareness of the rights in the people has resulted in the increasing significance of the role of the judiciary. The Judges have a duty to act with the foundation of a juristic principle, particularly, when the decision appears to break new grounds of judicial review to achieve the ideal of justice.

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75 114 US 1232 (1994).
76 Constitutional Limitations, Art. III, S. 2.
77 *MUSKRAT V. U.S.* (1911) 219 US 345: "The function of the Court is not to legislate; they only decide 'cases' or disputes existing between the adversaries, presented as such before them."
78 *ALBAMA STATE FEDERATION VS. MCADORY*, (1945) 325 US 450.
79 *SPECTOR MOTOR SERVICE VS. MCLAUGHLIN*, (1951) 323 US 101(105)